
PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

January 28, 2013

Agenda ID #11876

TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-286

This draft resolution regarding Affirming Citation FC-5184 Issued to SB Sedan and Limo Corp. doing business as South Bay Sedan and Limo Service will be on the agenda at the February 28, 2013 Commission meeting. The Commission may then vote on this draft resolution, or it may postpone a vote.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Opening comments shall be served no later than February 19, 2013, and reply comments shall be served no later than February 25, 2013. Service is required on all persons on the attached service list. Comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on Administrative Law Judge Kim at kk2@cpuc.ca.gov, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ KAREN V. CLOPTON

Karen V. Clopton, Chief
Administrative Law Judge

KVC:lil

Attachment

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-286
Administrative Law Judge Division

RESOLUTION

RESOLUTION ALJ-286 Affirming Citation FC-5184 issued to SB Sedan and Limo Corp. doing business as South Bay Sedan and Limo Service, pursuant to Resolution ALJ-187.

1. SUMMARY

This resolution denies the appeal of Field Citation 5184, issued to SB Sedan and Limo Corp. doing business as South Bay Sedan and Limo Service by the Commission's Consumer Protection and Safety Division on January 27, 2011.

2. BACKGROUND

On January 27, 2011, the Commission's Consumer Protection and Safety Division (CPSD)¹ issued Field Citation 5184 (FC-5184) to SB Sedan and Limo Corp. doing business as South Bay Sedan and Limo Service (Appellant), a charter-party carrier, for total of 675 separate counts of alleged violations of Public Utilities Code (Code) and Commission General Orders (GOs). CPSD, in FC-5184 assessed a \$10,000 fine, based on those 675 counts of alleged violations as follows:

First Set of Charges [Unauthorized Operation of Charter-Party Carrier Service, 135 Counts of Violations]: 135 days of operating charter-party carrier prior to issuance of its authority, from January 1, 2009 to May 17, 2009, in violation of Code section 5371;

¹ CPSD has been subsequently re-named the Safety and Enforcement Division. For convenience, we will continue to refer to CPSD except in the Order.

Second Set of Charges [Operation of Charter-Party Carrier Service without Evidence of Public Liability and Property Damage Insurance, 120 Counts of Violations]: 120 days of operating a charter-party carrier without evidence of public liability and property damage insurance coverage in effect and on file with the Commission, from January 1, 2009 to May 1, 2009 in violation of Code section 5391 and GO 115-F;

Third Set of Charges [Engagement of Employees without Evidence of Workers Compensation Insurance, Six Counts of Violations]: Engagement of six employees without evidence of workers' compensation insurance on file and in effect with the Commission, from January 1, 2009 to January 23, 2009, in violation of Code section 5378.1;

Fourth Set of Charges [Failure to Pre-employment Test Drivers in the Controlled Substance and Alcohol Testing Certification Program, Eight Counts of Violations]: Failure to pre-employment test eight drivers in the Controlled Substance and Alcohol Testing Certification Program, in violation of Code sections 5374(a)(1)(I) and 5381, and GO 157-D, Part 10;

Fifth Set of Charges [Failure to Enroll Drivers in the Department of Motor Vehicles Employer Pull Notice Program, Eight Counts of Violations]: Failure to enroll eight drivers in the Department of Motor Vehicles Employer Pull Notice Program, in violation of Code sections 5374(a)(1)(D) and 5381, and GO 157-D, Part 5.02 and California Vehicle Code section 1808.1; and

Sixth Set of Charges [Failure to Maintain Records, 398 Counts of Violations]: Failure to maintain waybills and to include required information waybills in violation of Code section 5381 and GO 157-D, Part 3.01.

On February 18, 2011, Appellant filed a notice of appeal (Appeal) of FC-5184.² CPSD conducted further investigation upon receipt of the Appeal. Thereafter,

² Pursuant to Resolution ALJ-187, issued by the Commission on September 22, 2005, CPSD is authorized to issue citations to various classes of transportation carriers for

the Appeal was forwarded to the Administrative Law Judge's Division by CPSD on December 19, 2011. Pursuant to the appeal procedures adopted by the Commission in Resolution ALJ-187, an evidentiary hearing was noticed and held in San Francisco on February 16, 2012.

3. DISCUSSION

The Appellant's position and basis for its appeal for FC-5184 are:

- (1) Dominic Nguyen was a contractor, and not an employee; thus, any violation resulting from consideration of Dominic Nguyen as an employee is unfounded;
- (2) Eric Chau was engaged as a contractor, and not an employee; thus, any violation resulting from consideration of Eric Chau as an employee is unfounded, despite the fact that Eric Chau did not possess valid subcarrier license; and
- (3) All of the violations are inherited from the Appellant's predecessor and the Appellant has been working diligently to "fix it since" October of 2008 when it purchased its charter-party business from the predecessor; thus, the fine of \$10,000 is excessive, based on these circumstances.

As discussed below, we affirm FC-5184, as amended during the evidentiary hearing.

3.1. Review of The Appellant's Defenses

During the evidentiary hearing, the Appellant's principal witness, its chief financial officer, testified and confirmed that "Basically every violation here we're in violation of all of them except the subcontractor parts."³ As to the "subcontractor parts", the same witness testified that some of CPSD's charges are partially unfounded because one of the alleged employee (Dominic Nguyen) was not an employee but a contractor, and another alleged employee (Eric Chau) was

violation of the Code and Commission GOs. In turn, a carrier issued such a citation may accept the fine imposed or contest it through a process of appeal.

³ Hearing Transcript at 48.

an employee only sometimes and contractor at other times.⁴ The Appellant's chief financial officer also testified that:

... us not knowing the rules of employee slash subcontractor. We didn't differentiate between the two. We always put him as a contractor, which was definitely incorrect the way we went about it.⁵

The Appellant's chief financial officer also testified that the Appellant corporation, at an unspecified later time, became aware that Eric Chau did not possess a proper license to operate as a subcontractor and testified that, "As soon as we found out, we put him on payroll."⁶

After the conclusion of the chief financial officer's testimony, CPSD amended its investigation report and FC-5184, to conform the report and FC-5184 to include the new allegation and charge based on the admissions by the Appellant of additional violation of having contracted Eric Chau "as subcontractor -- unlicensed subcontractor" for an unspecified number of days. The Appellant did not testify to and CPSD did not quantify the exact number of days that Chau had been contracted as an "unlicensed subcontractor" under Code section 5351 *et seq.* Because number of days was not clearly identified, CPSD stipulated to deem this amended new charge as a single violation, one count.

In terms of overall counts, the testimony of the chief financial officer and the amended charge by CPSD are inconsequential. Even if we take the Appellant's defenses and admissions at face value and consider CPSD's amended charge, the outcome would be reducing the total violation counts by only one (reduces the fourth charge of FC-5184 (see above) from eight to seven counts) while at the same time adding a violation for contracting an admitted unlicensed subcontractor, Eric Chau, in violation of Code section 5351 *et seq.* and GO 157-D,

⁴ *Id.* at 97-98.

⁵ *Id.* at 96.

⁶ *Ibid.*

section 3.04.⁷ Other charges will not be affected as Eric Chau was also, at various times, an employee by the Appellant's own admission.⁸

In sum, we find that with the admission and the defenses provided by the Appellant, the final number of violations at issue remains unaltered, at 675 counts.

3.2. Review of the Appellant's Argument that Fine is Excessive

Based on the 675 separate counts, CPSD assessed Appellant, holding Charter-Party Carrier Permit PSG24958-B, a fine of \$10,000 for violations of Commission General Orders 157 and 115, as well as Code sections 5351 *et seq.*, 5371, 5391, 5378.1, 5374, and 5381.

The Appellant's chief financial officer testified that he believed the fine was excessive and that his corporation purchased the limousine operation and began its operation in "end of 2008."⁹ He explained that, while he wore "all the hats in the company,"¹⁰ he had "[a]bsolutely zero"¹¹ prior experience in the limousine operator industry and that he had been learning on the job and by attending the "limo conventions" to figure out the company's legal duties to operate the limousine service.¹² The chief financial officer testified that:

... the old owner was out of compliance, and we inherited a company that was completely out of compliance on a number of points. And us coming in pretty new, not knowing what all the rules were -- we just went with all we had and didn't know any better. And that's why we were in violation of a lot of these.¹³

⁷ "A carrier shall not use the services of another carrier (sub-carrier) that provides the vehicle and the driver, unless the second carrier holds Commission authority as a charter party carrier...."

⁸ Hearing Transcript at 94-95.

⁹ *Id.* at 78.

¹⁰ *Id.* at 76.

¹¹ *Id.* at 68.

¹² *Id.* at 53, 76.

¹³ *Id.* at 51.

The chief financial officer further testified that the Commission should consider all of his company's and his good faith diligence and efforts to bring all of the inherited non-compliances into compliance, as soon as he "became aware of the violations."¹⁴ As showing of good faith, he presented Exhibits 12 and 13.¹⁵ They show that just a few hours before the evidentiary hearing in this appeal, on February 16, 2012, the chief financial officer unsuccessfully attempted to send a facsimile communication to Global Drug and Alcohol Testing (Exhibit 12) and an e-mail request to Commission's staff for assistance in this inquiry (Exhibit 13), to secure copies of pre-employment drug testing information concerning some of his employees, presumably to determine if his employees were or have been pre-employment tested to potentially refute the fourth charge above.

Exhibits 12 and 13, as well as the chief financial officer's related testimony and other testimony throughout the evidentiary hearing, suggest that the Appellant may still not have corrected all of the violations. Thus, more than three years after the Appellant purchased this limousine business, the record shows that the Appellant is still unaware and unable to document which of its employees have been pre-employment drug and alcohol tested.

Moreover, the chief financial officer's testimony is that even though the insurance papers show the predecessor corporate entity as the insured, he is providing that as a form of proof of insurance for the Appellant.¹⁶ The witness testified that he had not even noticed that the insurance was issued to a wrong legal entity but that, at some unspecified time, the insurance broker and someone who works for the broker "assured" him verbally that the insurance company would still provide liability coverage to the Appellant even though the insurance had been issued to the Appellant's predecessor, an entirely different corporate entity.¹⁷ We are not persuaded by this evidence as proof of diligence or evidence of insurance. In fact, this raises more concern that the management of this limousine operation lacks care on such critical legal details.

While we understand and appreciate from the Appellant's witness that he did what he thought was his best in trying to operate a new business with no prior

¹⁴ *Id.* at 66.

¹⁵ *Ibid.*

¹⁶ *Id.* at 71-72.

¹⁷ *Id.* at 71.

industry experience, we cannot ignore the fact that what is at stake is the safety and well-being of the public in using the service this Appellant provides. The Appellant's operation, as its chief financial officer explained, has all been trial and error since end of 2008 to February of 2012 (hearing date). Such knowledge he has acquired seems to have been largely gained from the annual limousine convention. For instance:

13 Q Are you aware of any Commission
14 requirement or CPSD requirement that requires
15 you to differentiate between employee versus
16 contractor worker?

17 A A particular code, I don't actually
18 know. I know from going to the limo
19 convention I attended, that was how it was
20 worded. I'm sure you guys have the same type
21 of wording.¹⁸

As a common carrier, entrusted with transportation service to the public, the Appellant must use the highest care, vigilance and caution.¹⁹ The elevated standard of care for common carriers is:

...based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers.²⁰

¹⁸ *Id.* at 84.

¹⁹ See Civil Code section 2100 which provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill;" and see also *Acosta v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27 which held "Common carriers bind themselves to carry safely those whom they take into their vehicles, and owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. Such carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances. [Internal citations omitted.]"

²⁰ See *Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1507.

Consistent therewith, the CPSD witness testified and stressed the importance of holding Appellant accountable for these violations. The CPSD witness further testified that these violations posed a significant safety risk, not only to its own employees, but also to the general public and motorists at large as it operated prior to receiving Commission authority, failed to secure public liability and property damage insurance, did not hold workers' compensation insurance, and did not ensure that their employees were pre-employment tested in the controlled substance and alcohol testing certification program and Department of Motor Vehicles employers pull notice program.²¹

Here, the assessed fine of \$10,000 is considerably less than the maximum allowable fine under the Code, which provides a maximum \$2,000 fine per each offense.²² The Code provides that in the case of a continuing violation each day's continuance is a separate and distinct offense. If calculated at the maximum of \$2,000 per violation for 675 violations as detailed in the six charges in FC-5184, the fine would be far greater than the reasonable one assessed by CPSD in FC-5184.

The law and policy of public safety require that CPSD and the Commission take into account several factors, including those in Code section 2104.5 (i.e., size of business, gravity of violation, good faith of business to achieve compliance). We also directed that staff take into account whether the violations are self-identified and self-corrected, and whether injury or damage resulted from the violations.

The CPSD witness testified that CPSD did not seek the maximum potential fine here but assessed the fine of \$10,000 instead, an equivalent of less than \$15 per violation. This considerable reduction in fine assessment was based on the CPSD's guidelines, taking into consideration all of the particulars of the Appellant's circumstances including the overall nature of the violations, the carrier's revenue, a carrier's willingness to cooperate, the egregiousness of the violations, fleet size, similar fines to other similar sized carriers, and prior enforcement history.²³

²¹ Hearing Transcript at 34.

²² Code section 5413 provides for penalty of not more than \$2,000 for each offense. Code section 5415 provides that every violation is a separate and distinct offense, and in case of a continuing violation, each day's continuance thereof is a separate and distinct offense.

²³ Hearing Transcript at 33-35.

We review FC-5184 here and find that CPSD appropriately considered all those factors. Therefore, we find that CPSD's fine assessments which reflect substantial reduction in fine below the maximum, based on the circumstances of the Appellant, is proper, and that imposing a \$10,000 fine here is necessary and appropriate to sanction misconduct and secure future compliance. We also recognize that in assessing this fine, CPSD gave due consideration to the Appellant's willingness to cooperate with the investigator and to provide access to its books and records. However, further reduction of the fine is unjustified in light of the public safety issues raised by the Appellant's 675 violations, some of which may still remain unresolved years after the issuance of FC-5184.

We direct the Appellant to pay this fine in full within 45 days of this resolution or to contact CPSD immediately to make a payment plan and begin to make payments within 45 days based on an approved written payment plan with CPSD. Further, we direct the Appellant to reference this resolution and proceeding in any future new or renewal applications by the Appellant, or its two principals, Shawne Portman and Julia Sun, individually or under a corporate name, for a charter-party certificate.

4. CONCLUSION

The Appellant's appeal is denied. Citation No. FC-5184, as amended on February 16, 2012 during the evidentiary hearing, is affirmed.

5. COMMENTS

Code section 311(g)(1) requires that a draft resolution be served on all parties, and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. On _____, a draft of today's resolution was distributed for comment to the two parties, the Appellant and CPSD. On _____, comments were filed by _____. On _____, reply comments were filed by _____.

FINDINGS OF FACT

1. Appellant SB Sedan and Limo Service Corp. holds Charter-Party Carrier Permit PSG24958-B and is subject to Commission's regulatory jurisdiction under, *inter alia*, Commission GOs 157 and 115, as well as Code sections 5351 *et seq.*, 5371, 5391, 5378.1, 5374, and 5381.

2. On January 27, 2011, the Commission's CPSD issued FC-5184 to the Appellant for total of 675 separate counts of alleged violations of Code and Commission GOs.
3. Code section 5413 provides for penalty of not more than \$2,000 for each offense. Code section 5415 provides that every violation is a separate and distinct offense, and in case of a continuing violation, each day's continuance thereof is a separate and distinct offense.
4. CPSD, in FC-5184 assessed a \$10,000 fine, based on those 675 counts of violations as follows:
 - a. 135 days of operating charter-party carrier prior to issuance of its authority, from January 1, 2009 to May 17, 2009, in violation of Code section 5371;
 - b. 120 days of operating a charter-party carrier without evidence of public liability and property damage insurance coverage in effect and on file with the Commission, from January 1, 2009 to May 1, 2009 in violation of Code section 5391 and GO 115-F;
 - c. Engagement of six employees without evidence of workers' compensation insurance on file and in effect with the Commission, from January 1, 2009 to January 23, 2009, in violation of Code section 5378.1;
 - d. Failure to pre-employment test eight drivers in the Controlled Substance and Alcohol Testing Certification Program, in violation of Code sections 5374(a)(1)(I) and 5381, and GO 157-D, Part 10;
 - e. Failure to enroll eight drivers in the Department of Motor Vehicles Employer Pull Notice Program, in violation of Code sections 5374(a)(1)(D) and 5381, and GO 157-D, Part 5.02 and California Vehicle Code section 1808.1; and

- f. Failure to maintain waybills and to include required information waybills in violation of Code section 5381 and GO 157-D, Part 3.01.
5. On February 18, 2011, the Appellant SB Sedan and Limo Corp. doing business as South Bay Sedan and Limo Service filed a notice of appeal of FC-5184.
6. During the evidentiary hearing, the Appellant's principal witness and chief financial officer testified and admitted to majority of the violations set forth in FC-5184.
7. After the conclusion of the chief financial officer's testimony, CPSD amended and modified its investigation report and FC-5184, to conform the report and FC-5184 to include the new allegation and modified charge based on the admissions by the Appellant of additional admitted violation of having contracted Eric Chau "as subcontractor -- unlicensed subcontractor" for an unspecified number of days, in violation of GO 157, section 3.04.
8. With the admissions and the defenses provided by the Appellant plus CPSD's amended charge, the final number of violations remains unaltered, at 675 counts of violations.
9. CPSD presented competent and persuasive evidence to support its allegations of 675 counts of violations, as amended, against the Appellant.
10. Appellant failed to present competent and persuasive evidence in support of its notice of appeal and also failed to persuasively refute and deny the CPSD's allegations of 675 violations, as amended.
11. These violations posed a significant safety risk, not only to its own employees, but also to the general public and motorists at large as it operated prior to receiving Commission authority, failed to secure public liability and property damage insurance, did not hold workers' compensation insurance, and did not ensure that their employees were pre-employment tested in the controlled substance and alcohol testing certification program and Department of Motor Vehicles employers pull notice program.

12. As a common carrier, entrusted with the transportation service to the public, the Appellant must use the highest care, vigilance and caution, and the elevated standard of care for common carriers is:

...based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers.
13. CPSD properly considered the factors delineated in the Code section 2104.5 (i.e., size of business, gravity of violation, good faith of business to achieve compliance) and took into account whether the violations are self-identified and self-corrected, and whether injury or damage resulted from the violations.
14. CPSD gave due consideration for Appellant's willingness to cooperate with the investigator and providing access to its books and records while carefully balancing the importance of the public safety issues raised by the Appellant's 675 violations some of which may still remain unresolved years after the issuance of FC-5184, as reflected in the testimonies of the evidentiary hearing.
15. CPSD's fine assessments, which reflect substantial reduction in fine below the maximum based on the circumstances of the Appellant, are proper, and imposing a \$10,000 fine here is necessary and appropriate to sanction misconduct and secure future compliance.
16. Further reduction of the fine is unjustified in light of the public safety issues raised by the Appellant's 675 violations, some of which may still remain unresolved years after the issuance of FC-5184.

CONCLUSIONS OF LAW

1. The Appellant's purported defenses are invalid.
2. The Appellant should be held responsible and accountable for the violations set forth in the CPSD's investigation report and FC-5184, as amended on February 16, 2012 during the hearing to include the new allegation and charge based on the admissions by the Appellant of additional admitted violations of

having contracted Eric Chau “as subcontractor -- unlicensed subcontractor” for an unspecified number of days, in violation of GO 157, section 3.04.

3. The Appellant should pay the assessed fine of \$10,000 fine in full within 45 days of this resolution or to contact CPSD immediately to make a payment plan and begin to make payments within 45 days based on an approved written payment plan with CPSD.
4. The Appellant and its two principals, Shawne Portman and Julia Sun, should reference this resolution and proceeding in any future new or renewal applications by the Appellant, or its two principals, Shawne Portman and Julia Sun, individually or under a corporate name, for a charter-party certificate.

IT IS THEREFORE ORDERED that:

1. The Field Citation FC-5184, as amended during the February 16, 2012 hearing, is affirmed.
2. The Appellant SB Sedan and Limo Service Corporation shall pay a fine of \$10,000 in full within 45 days of this resolution or contact the Commission’s Safety and Enforcement Division (formerly CPSD) and begin to make payments within 60 days based on an approved written payment plan with the Division. All checks should be made payable to the California Public Utilities Commission and sent to the Commission’s Fiscal Office, 505 Van Ness Avenue, San Francisco, California 94102. Upon payment the fine shall be deposited in the State Treasury to the credit of the General Fund.
3. If the Appellant SB Sedan and Limo Service Corporation fails to pay the fine as provided herein, the Commission’s Safety and Enforcement Division shall take any and all action provided by law to recover the unpaid fine and ensure compliance with applicable statutes and Commission orders.
4. The Appellant SB Sedan and Limo Service Corporation and its two principals, Shawne Portman and Julia Sun, shall reference this proceeding and the related fine, in any future proceeding for new or renewal applications by the Appellant, or its two principals, Shawne Portman and Julia Sun, individually or under a corporate name, for a charter-party certificate.

5. The appeal process for this citation is closed.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director

INFORMATION REGARDING SERVICE

I have provided notification of the foregoing Draft Resolution ALJ-286 to the electronic mail addresses on the attached service lists, as well as a hard copy by U.S. mail.

Dated January 28, 2013, at San Francisco, California.

/s/ LILLIAN LI

Lillian Li

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.

Service List
(FC-5184)

Martha Perez
Attorney for Consumer Protection and Safety Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
martha.perez@cpuc.ca.gov

Cynthia McReynolds,
California Public Utilities Commission
Consumer Protection and Safety Division
505 Van Ness Avenue
San Francisco, CA 94102
cynthia.mcreynolds@cpuc.ca.gov

Sheri Boles
California Public Utilities Commission
Consumer Protection and Safety Division
505 Van Ness Avenue
San Francisco, CA 94102
sheri.boles@cpuc.ca.gov

Shawne Portman
SB Sedan and Limo Corp.
d/b/a South Bay Sedan and Limo Service
335 Mansell Street
San Francisco, California 94134
southbay@southbaysedan.com

Julia Sun
SB Sedan and Limo Corp.
d/b/a South Bay Sedan and Limo Service
335 Mansell Street
San Francisco, California 94134
southbay@southbaysedan.com